

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, et al.,

Plaintiffs,

v.

STATE OF WASHINGTON, et al.,

Defendants.

No. C70-9213RSM

Subproceeding No. 11-2

ORDER ON MOTIONS FOR SUMMARY
JUDGMENT

I. INTRODUCTION

This matter comes before the Court after remand from the Ninth Circuit Court of Appeals and upon the Jamestown S’Klallam Tribe’s, Port Gamble S’Klallam Tribe’s and Lower Elwha Klallam Indian Tribe’s (collectively “the S’Klallam”), and Lummi Nation’s (“the Lummi”) motions for summary judgment. Dkts. #164, #167 and #168.¹ The S’Klallam request that the Court grant summary judgment on the issues presented in their Request for Determination (“RFD”) filed November 8, 2011. *See* Dkt. # 1. The RFD asks the Court to find that the actions of the Lummi in fishing in the “case area” is not in conformity with Final Decision I. The case area was originally defined in the RFD as the eastern end of the Strait of Juan de Fuca, specifically “the marine waters northeasterly of a line running from Trial Island

¹ Dkts. #20,972, #20,976 and #20,977 in lead proceeding *USA v. State of Washington*, Case No. C70-9213RSM.

1 near Victoria, British Columbia, to Point Wilson on the westerly opening of Admiralty Inlet,
2 bounded on the east by Admiralty Inlet and Whidbey Island, and bounded on the north by
3 Rosario Strait, the San Juan Islands, and Haro Strait.” Dkt. # 1 at ¶ 2. As further discussed
4 herein, since the RFD was filed, the Ninth Circuit Court of Appeals has remanded the matter to
5 this Court to consider whether the waters immediately to the west of northern Whidbey Island
6 are a part of the Lummi’s usual and accustomed fishing grounds and stations (“U&A”). Dkt.
7 #109.
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9 The Lummi has opposed the S’Klallam motion and also moves for summary judgment
10 in its favor. Dkt. #167. The Lummi moves first for a determination that there is no proof
11 Judge Boldt expressly excluded the disputed waters from the Lummi’s U&A. *Id.* It next
12 moves for partial summary judgment that this Court has jurisdiction to hear evidence on the
13 extent of the U&A in the disputed marine area, asserting that Judge Boldt did not specifically
14 determine the western boundary of the Lummi’s U&A, and therefore a genuine question of
15 material fact exists on the boundary location. *Id.*
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17 The matter having now been fully briefed, and having determined that oral argument is
18 not necessary in this matter, the Court now GRANTS S’Klallam’s motions for summary
19 judgment for the reasons set forth herein and DENIES Lummi’s motion for summary judgment.
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21 II. BACKGROUND

22 This case arises from an RFD brought by the S’Klallam to determine certain fishing
23 rights of the Lummi under the 1855 Treaty of Point Elliott. This dispute has more than 25
24 years of litigation history behind it. Dkt. #1.
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1 On January 22, 1855, the Lummi entered into the Treaty of Point Elliott with the United
2 States. 12 Stat. 927 (1855). This treaty “secured” to the Lummi “[t]he right of taking fish at
3 usual and accustomed grounds and stations” (hereinafter referred to as “U&A”). *Id.* at 928.

4 In 1970 the United States, as trustee for all the treaty tribes including the S’Klallam and
5 the Lummi, filed suit in the Western District of Washington to obtain an interpretation of the
6 Treaty of Point Elliott and an injunction protecting treaty fishing rights from interference by
7 Washington State. Both the S’Klallam and the Lummi intervened as plaintiffs. In 1974, Judge
8 Boldt issued extensive findings of fact, conclusions of law, and a permanent injunction. *United*
9 *States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974) (“Boldt Decree”). The Boldt
10 Decree defined the Treaty of Point Elliott’s reference to “usual and accustomed grounds and
11 stations” as meaning “every fishing location where members of a tribe customarily fished from
12 time to time at and before treaty times, however distant from the then usual habitat of the tribe,
13 and whether or not other tribes then also fished in the same waters[.]” *Id.* at 332.

14 The U&A of the Lummi Nation was described by Judge Boldt in Findings of Fact
15 (“FF”) 45 and 46 of his decision:

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19 45. Prior to the Treaty of Point Elliott, the Lummi, Semiahmoo and Samish
20 Indians had been engaged in trade in salmon, halibut and shellfish both with
21 other Indians and with non-Indians. (FPTO § 3-42) This trade continued
22 after the treaty. (Ex. USA-30, p. 6) At the time of the treaty they maintained
23 prosperous communities by virtue of their ownership of lucrative saltwater
24 fisheries. The single most valuable fish resource was undoubtedly the
25 sockeye, which the Lummis were able to intercept in the Straits on the
26 annual migration of the sockeye from the ocean to the Fraser River. (Ex.
27 USA-30, p. 11) Lummi Indians developed a highly efficient technique,
28 known as reef netting, for taking large quantities of salmon in salt water.
(Ex. USA-30, p. 11) Aboriginal Indian ‘reef netting’ differs from present
methods and techniques described by the same term. (FPTO § 3-40) The
Lummis had reef net sites on Orcas Island, San Juan Island, Lummi Island
and Fidalgo Island, and near Point Roberts and Sandy Point. (Ex. USA-30,
p. 23; Exs. USA-62, USA-63; Tr. 1699, l. 2 to 1701, l. 21) When nature did
not provide optimum reef conditions the Indians artificially created them.

(Ex. USA-30, p. 17) Reef netting was one of the two most important economic activities engaged in by these Indians, the other being the sale of dog fish oil. These Indians also took spring, silver and humpback salmon and steelhead by gill nets and harpoons near the mouth of the Nooksack River, and steelhead by harpoons and basketry traps on Whatcom Creek. They trolled the waters of the San Juan Islands for various species of salmon. (FPTO § 3-42; Ex. USA-30, pp. 6-25; Ex. G-21, pp. I-19-I-21)

46. In addition to the reef net locations listed above, the usual and accustomed fishing places of the Lummi Indians at treaty times included the marine areas of Northern Puget Sound from the Fraser River south to the present environs of Seattle, and particularly Bellingham Bay. Freshwater fisheries included the river drainage systems, especially the Nooksack, emptying into the bays from Boundary Bay south to Fidalgo Bay. (Exs. USA-20, p. 39; USA-30, pp. 23-26; Exs. PL-94a, b, c, d, e, t, u, v, w, x; Ex. G-26, pp. II-9 to II-13; Exs. USA-60, USA-61, USA-62, USA-63, USA-64; Tr. 1665, l. 4-11, l. 23-24).

U.S. v. Washington, 384 F. Supp. at 360.

A. Judge Coyle's Decision

In 1989, the S'Klallam, along with the Skokomish Tribe, filed an RFD regarding the Lummi U&A, which was opened as Subproceeding 89-2 and assigned to United States District Judge Robert Coyle. The Tribes asked for a ruling that Lummi fishing in the case area was "not in conformity with" the Findings of Fact in *Decision I*, which is one way by which a party may invoke the Court's jurisdiction under the Permanent Injunction. The Request asserted that the Strait of Juan de Fuca, Admiralty Inlet, and the mouth of Hood Canal are all outside the Lummi U&A as it was described by Judge Boldt, and therefore, Lummi fishing in these areas is "not in conformity with" that decision.

The parties cross-moved for summary judgment. On February 13, 1990, Judge Coyle granted summary judgment to the S'Klallam, stating with respect to the case area, "There is no question in the court's mind from the evidence presented to Judge Boldt that the Lummis' usual and accustomed fishing places were not intended to include the Strait of Juan de Fuca. The

1 court is further persuaded that the mouth of the Hood Canal would not be an area which Judge
2 Boldt would have intended to include in the Lummis' usual and accustomed fishing places."
3 Case No. C70-9213RSM, Dkt. #11596 at 13-14. Judge Coyle also concluded that "Judge Boldt
4 did not intend Admiralty Inlet to be part of the Lummis' usual and accustomed fishing places."
5 Case No. C70-9213, Dkt. # 11596 at 14.

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7 However, no final judgment was entered by Judge Coyle. *United States v. Lummi*
8 *Indian Tribe*, 235 F.3d 443, 447-48 (9th Cir. 2000). Instead, the Lummi filed a cross-request
9 for determination, and both parties continued to litigate. *Id.* The Lummi's cross-request sought
10 determination that:

11 the [U&A] of the Lummi Indian tribe include the waters of the Strait of
12 Juan de Fuca east from the Hoko River to the mouth of the Puget Sound, *the*
13 *waters west of Whidbey Island*, Admiralty Inlet, the waters south of
14 Whidbey Island to the present environs of Seattle, and the waters of Hood
15 Canal south from Admiralty Inlet to a line drawn from Termination Point
due East across Hood Canal.

16 (emphasis added). The Lummi filed a motion to dismiss and a motion for summary judgment;
17 the S'Klallam filed a cross motion to dismiss.

18 **B. Judge Rothstein's Decision**

19 In 1993, the case was assigned to United States District Judge Barbara Rothstein. After
20 lengthy additional proceedings, on September 1, 1998, Judge Rothstein denied the Lummi
21 motions, and granted the S'Klallam's motion to dismiss. She described in her Order the issues
22 raised in Subproceeding 89-2 as whether the Lummi's U&A includes "the Strait of Juan de
23 Fuca, Admiralty Inlet, or the mouth of Hood Canal." *USA v. Washington*, Case No. 70-
24 9213RSM, Dkt. # 16550 at 2. She concluded that Judge Boldt did not intend to include the
25 Strait of Juan de Fuca, Admiralty Inlet, or the mouth of Hood Canal in the Lummi U&A. *Id.* at
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1 18. The Clerk was directed to enter judgment in favor of the S’Klallam and Skokomish tribes,
2 and dismiss the subproceeding.

3 The Lummi appealed. *Lummi Indian Tribe*, 235 F.3d at 445. The Ninth Circuit Court
4 of Appeals held, first, that the Coyle Decision was not final because Judge Coyle never entered
5 final judgment. *Id.* at 448-49. Because it was not final, the Court of Appeals continued, the
6 Coyle Decision merged into the Rothstein Decision. *Id.* at 449. Therefore, the Court of
7 Appeals concluded, both the Coyle and Rothstein decisions were before the court. *Id.*

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9 As the Court of Appeals framed the issue:

10 The question before Judge Coyle was whether the Lummi’s [U&A], as
11 expressed in Finding of Fact 46 of *Decision I* [*i.e.* of the Boldt Decree] –
12 “the marine areas of Northern Puget Sound from the Fraser River south to
13 the present environs of Seattle”—included the disputed areas [*i.e.* the Strait
14 of Juan de Fuca, Hood Canal, and the Admiralty Inlet]. The phrase used by
15 Judge Boldt is ambiguous because it does not delineate the western
16 boundary of the Lummi’s [U&A].

17 *Id.* The Court of Appeals found that Judge Boldt’s language in describing the Lummi U&A is
18 ambiguous, “because it does not delineate the western boundary of the Lummi’s usual and
19 accustomed fishing grounds and stations.” *Lummi Indian Tribe*, 235 F.3d at 449.

20 The panel then analyzed the evidence that was before Judge Boldt and concluded that
21 Judge Boldt had not intended to include either the Strait of Juan de Fuca or the Hood Canal in
22 the Lummi’s U&A, because Judge Boldt commonly distinguished between the Puget Sound,
23 where the Lummi fished, and the Strait of Juan de Fuca and Hood Canal, where other tribes
24 fished. *Id.* at 450-52. The panel held “[i]t is clear that Judge Boldt viewed Puget Sound and
25 the Strait of Juan de Fuca as two distinct regions, with the Strait lying to the west of the
26 Sound.” *Id.* at 451–52. Thus, “had he intended to include the Strait of Juan de Fuca in the
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1 Lummi's usual and accustomed fishing grounds and stations, he would have used that specific
2 term, as he did elsewhere in *Decision I.*" *Lummi Indian Tribe*, 235 F.3d. at 452.

3 The panel also concluded that Judge Boldt did intend for the Admiralty Inlet, *i.e.* "[t]he
4 waters to the west of Whidbey Island, separating that island from the Olympic Peninsula[,] to
5 be included in the Lummi's U&A, because, "[g]eographically," the Admiralty Inlet

6
7 would likely be a passage through which the Lummi would have traveled
8 from the San Juan Islands in the north to the "present environs of Seattle."
9 If one starts at the mouth of the Fraser River (a Lummi [U&A], see
10 Findings of Fact 45 & 46) and travels past Orcas and San Juan Islands (also
Lummi [U&A], see Finding of Fact 45), it is natural to proceed through
Admiralty Inlet to reach the "environs of Seattle."

11 *Id.* at 452 (*quoting* the Boldt Decree, 384 F. Supp. at 360). The panel thus affirmed in part and
12 reversed in part, concluding:

13 We are persuaded that Judge Boldt did not intend for either the Strait of
14 Juan de Fuca or the mouth of the Hood Canal to be included within the
15 Lummi's usual and accustomed grounds and stations. Based on the
16 geography of the area, however, we conclude that Judge Boldt did intend to
include Admiralty Inlet.

17 *Lummi*, 235 F. 3d at 453.

18 After *Lummi Indian Tribe* was decided, the Lummi Natural Resources Commission, a
19 tribal body, interpreted the decision as including in the Lummi U&A "Haro Strait and
20 Admiralty Inlet and the waters between the two." In April 2009, the S'Klallam moved for the
21 district court in Subproceeding 89-2 to hold the Lummi in contempt for violating the court
22 orders regarding the extent of the Lummi's U&A. The Lummi moved to dismiss, arguing that
23 Subproceeding 89-2 was closed, and the issue should be addressed in a new subproceeding.
24 This Court, Judge Martinez (to whom the case had been reassigned), granted the Lummi's
25 motion to dismiss and denied the S' Klallam's motion without prejudice so it could be renewed
26 as a new subproceeding.
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C. Subproceeding 11-02

On November 11, 2011, the S’Klallam initiated the instant proceeding by filing a Request for Determination that the Lummi’s U&A does not include “the eastern portion of the Strait of Juan de Fuca or the waters west of Whidbey Island (excepting Admiralty Inlet).” In particular, the S’Klallam defined the “case area” at dispute as follows:

Lummi is impermissibly fishing i[n] the marine waters northeasterly of a line running from Trial Island near Victoria, British Columbia, to Point Wilson on the westerly opening of Admiralty Inlet, bounded on the east by Admiralty Inlet and Whidbey Island, and bounded on the north by Rosaria Strait, the San Juan Islands, and Haro Strait.

Dkt. #1. The S’Klallam then moved for summary judgment.

On October 11, 2012, this Court granted summary judgment in favor of the S’Klallam, finding that “[t]he law of the case holds that the Lummi U&A does not include the Strait of Juan de Fuca or the waters west of Whidbey Island that were named in the Lummi Cross-Request for Determination.” Dkt. #59 at 16. In reaching that conclusion, this Court relied, in part, on Judge Rothstein’s determination that there was no difference between “the Strait of Juan de Fuca, Hood Canal, and the Admiralty Inlet” and a list of locations that included “the waters west of Whidbey Island.” *See* Dkt. #59 at 8-9. This Court also relied on a report on traditional U&As of Indian tribes, including the Lummi, by Dr. Barbara Lane, on which Judge Boldt had relied in making his findings of facts. That report stated “Lummi fishermen were accustomed, at least in historic times, and probably earlier, to visit fisheries as distant as the Fraser River in the north and Puget Sound in the south.” *See* Dkt. #59 at 11-15. This Court found that this statement does not compel the conclusion that the waters west of northern Whidbey Island should be included in the Lummi U&A because “the Lummi have pointed to

1 no facts before Judge Boldt which would support the conclusion that he intended to include all
2 the marine waters in between.” Dkt. #59 at 15.

3 The Lummi then moved for reconsideration on the ground that this Court’s decision
4 was overbroad because it interpreted the Lummi’s U&A as not including waters off the
5 southern coast of the San Juan Islands. This Court denied the motion, but did clarify that “the
6 Lummi U&A should include nearshore waters immediately to the south of San Juan Island and
7 Lopez Island.” Dkt. #72. The Lummi then appealed both this Court’s summary judgment
8 decision and its denial of its motion for reconsideration.
9

10 **D. The Ninth Circuit Decision**

11 On August 19, 2014, in a 2-1 opinion, the Ninth Circuit Court of Appeals reversed this
12 Court’s summary judgment determination. Dkt. #109. The Court of Appeals concluded that
13 because its own prior decision in the matter (under Subproceeding 89-2) was ambiguous, the
14 “law of the case” doctrine did not control the outcome of this matter. The Court explained:
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16 The district court found that earlier decisions in Subproceeding 89-2 had
17 already established that the Strait of Juan de Fuca’s eastern boundary was
18 the western shores of northern Whidbey Island. . . . To the district court, . .
19 the Rothstein Decision held that “the Strait of Juan de Fuca” and “the
20 waters west of Whidbey Island” were not different regions, but rather the
21 “waters” were included in the “Strait.” Moreover, the district court
22 determined that, while it is true that the Ninth Circuit reversed the Rothstein
23 Decision with regard to the Admiralty Inlet, finding that the Inlet was a part
24 of the Lummi’s U&A, it affirmed the rest of the Rothstein Decision.
25 Therefore, the district court held, it is law of the case that the eastern
26 boundary of the Strait of Juan de Fuca is the western shores of northern
27 Whidbey Island.
28

This reasoning suggests it has already been determined by necessary
implication that the waters immediately west of northern Whidbey Island
are part of the Strait of Juan de Fuca and hence not a part of the Lummi’s
U&A. The Rothstein Decision determined that “the Strait of Juan de Fuca,
Admiralty Inlet, [and] the mouth of the Hood Canal” and the “waters west
of Whidbey Island” were not different regions, but rather the latter was a
subset of the former. The Rothstein Decision also determined that the Strait

1 of Juan de Fuca was not included in the Lummi's U&A. *Lummi Indian*
2 *Tribe* affirmed the second of these findings, namely that the Strait of Juan
3 de Fuca was not included in the Lummi's U&A. 235 F.3d at 450–52. This
4 finding at least suggests that it also affirmed the first finding that the
"waters west of Whidbey Island" are a subset of the Strait of Juan de Fuca,
and therefore are not included in the Lummi's U&A.

5 Other language in *Lummi Indian Tribe*, however, contains reasoning that
6 would suggest just the opposite, namely that the waters immediately to the
7 west of Whidbey Island *are* included in the Lummi's U&A. The reason the
8 2000 Ninth Circuit panel reversed the Rothstein Decision to find that the
9 Admiralty Inlet *was* included in the Lummi's U&A was that the Admiralty
10 Inlet "would likely be a passage through which the Lummi would have
11 traveled" from the Fraser River, south through the San Juan Islands, to the
12 present environs of Seattle. *Id.* at 452. Applying that reasoning here, the
"passage through which the Lummi would have traveled" from the San Juan
Islands to the Admiralty Inlet would have been the waters directly to the
west of Whidbey Island. Thus, this reasoning suggests that the waters
immediately to the west of northern Whidbey Island would be included
within the Lummi's U&A.

13 . . .

14 Thus, each of *Lummi Indian Tribe*'s two holdings implies a different result.
15 Therefore, we conclude that *Lummi Indian Tribe* is ambiguous regarding
16 whether the waters immediately to the west of northern Whidbey Island are
included within the Lummi U&A, and accordingly that this issue has not yet
been decided explicitly or by necessary implication.

17 . . .

18 We hold that no prior decision in this case has yet explicitly or by necessary
19 implication determined whether the waters immediately west of northern
20 Whidbey Island are a part of the Lummi's U&A.

21 Dkt. #109 at 14-16. The matter was then remanded for further proceedings in this Court.

22 **E. Current Proceedings**

23 After remand, the Court raised the issue of whether there were jurisdictional questions
24 brought about by the Ninth Circuit's remand and in dispute between the parties, which should
25 be resolved prior to reaching the merits. *See* Dkt. # 156, Ex. A (Transcript). After hearing
26 argument from the parties, the Court entered a briefing schedule for dispositive motions, with a
27 motion noting date of June 30, 2015. *See id.* at 10:18-20, 14:22-24; Dkt. # 123.
28

1 The Court subsequently granted the S’Klallam’s request for a temporary restraining
2 order and permanent injunction, enjoining the Lummi from issuing regulations or encouraging
3 its members to fish in the disputed waters pending a decision on the merits. Dkts. #132 and
4 #150. The parties’ motions for summary judgment are now ripe for review.

5 III. JURISDICTION

6 This Court has already addressed potential jurisdictional issues in this case. Dkt. #174.
7
8 As previously explained:

9 The S’Klallam and Lower Elwha Tribes initiated this subproceeding
10 through an RFD that invoked Paragraph 25(a)(1), (a)(4), and (a)(7) of Final
11 Decision #1, 384 F.Supp. at 419, as modified by this Court’s August 23,
12 1993 Order Modifying Paragraph 25 of Permanent Injunction (Case No. 70-
13 9213, Dkt. # 13599). Dkt. # 1, Ex. 1 at ¶ 4. While the Court recognized
14 that there is some jurisdictional ambiguity in this case following remand,
15 the Court agreed with Petitioners at oral argument, and continues to agree,
16 that it is appropriate to proceed first under the jurisdictional provisions
17 invoked in the RFD before entertaining a request to proceed under
18 Paragraph 25(a)(6).

19 Paragraph 25(a)(1) provides the Court with jurisdiction to determine
20 whether actions by a party are in conformity with Judge Boldt’s findings in
21 Final Decision # 1. While Paragraph 25(a)(1) jurisdiction comes into play
22 where there is potential ambiguity in Judge Boldt’s findings, Paragraph
23 25(a)(6) instead provides jurisdiction to resolve “the location of any of a
24 tribe’s usual and accustomed fishing grounds [(“U&A”)] not specifically
25 determined by Final Decision # 1.” Paragraph 25(a)(6) jurisdiction is thus
26 contingent on the Court’s finding, or the parties agreeing, that the disputed
27 waters in question were not specifically determined by Judge Boldt.

28 The Court accordingly finds it appropriate to proceed initially under
Paragraph 25(a)(1) in order to determine whether the waters west of
Whidbey Island are part of the Lummi’s U&A, as described by Judge Boldt
in findings of fact 45 and 46 in Final Decision # 1. Only if the issues
cannot be resolved by looking at the record before Judge Boldt, and should
the Court find that the Lummi’s U&A in question was not specifically
determined in Final Decision # 1, would it be appropriate to turn to
Paragraph 25(a)(6) for further proceedings.

Dkt. #174 at 3-4. Accordingly, the Court shall proceed in that manner.

IV. DISCUSSION

A. Motions to Strike

As an initial matter, the Court addresses a number of pending motions to strike filed by various parties.

1. S'Klallam's Motion to Strike Lummi's Motion Under Paragraph 26(a)(6)

The S'Klallam have moved to strike the Lummi's Motion for Partial Summary Judgment to the extent that it has been brought under Paragraph 26(a)(6). Dkt. #183 at 16-19. The motion is DENIED AS MOOT. For the reasons discussed below, the Court does not reach any Paragraph 26(a)(6) analysis and denies that portion of Lummi's motion for summary judgment.

2. S'Klallam's Motions to Strike Certain Exhibits

The S'Klallam have also moved to strike the Declarations of Philip Buri and Sharon Kinley and attachments thereto, along with Part IV of Lummi's motion which relies on those documents. Dkts. #186 at 2-4 and #193 at 9-11. The S'Klallam argue that these documents are inadmissible because they are post-Boldt and for other evidentiary deficiencies. The S'Klallam further move to strike an additional Declaration of Philip Buri and its attachments, Appendix A to the Lummi Reply brief, and references to certain materials in the Reply brief. Dkt. #199 and Dkt. #205. The motions are GRANTED. These materials were not before Judge Boldt at the time he rendered Final Decision I, and it appears they are actually being offered in support of the Lummi's summary judgment motion under Paragraph 25(a)(6). Further, Ms. Kinley's Declaration presents evidentiary issues as it merely purports to agree with the conclusions set forth by another person, and does not contain any specific factual bases for her own

1 concurrence with those conclusions. *See* Dkt. #181. Accordingly, the following materials are
 2 STRICKEN from the record:

- 3 • The Declaration of Philip Buri (Dkt. #180) and its attachments;
- 4 • The Declaration of Sharon Kinley (Dkt. #181) and its attachments;
- 5 • Those portions of Section IV of the Lummi Motion for Summary Judgment
- 6 (Dkt. #167 at 11-19) that rely on Dkts. #180 and #181;
- 7 • The Declaration of Philip Buri (Dkt. #190) and its attachments;
- 8 • Appendix A to the Lummi Reply brief (Dkt. #189, Appendix A); and
- 9 • Those portions of the Lummi Reply brief that reference the stricken materials
- 10 (Dkt. #189 at 6:10-13 and 9:3-7, 9:10-17, 9:18-20).
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13 3. *Suquamish Indian Tribe's Motion to Strike Improper Reply Briefs*

14 Interested party Suquamish Indian Tribe has moved to strike the Reply brief filed by
 15 Interested Party State of Washington and the Reply brief filed by Interested Party Tulalip
 16 Tribes, on the basis that the Court's rules do not allow non-moving parties to file such briefs.
 17 Dkt. #200. The Lummi join in that motion. Dkt. #202. The Court DENIES the motions. This
 18 Court has previously clarified that Interested parties in all subproceedings may exercise the
 19 rights afforded to all parties. *See* Case No. 09-sp-01, Dkt. #247 at 10-11.

21 **B. Paragraph 25(a)(1) Analysis**

22 When conducting a Paragraph 25(a)(1) analysis, the Court engages in a two-step
 23 inquiry, first determining whether a particular finding of fact is ambiguous, and, if so, then
 24 examining the record in front of Judge Boldt to clarify his intent. *Upper Skagit Indian Tribe v.*
 25 *Washington*, 590 F.3d 1020 (9th Cir. Wash. 2010).
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1 *1. Finding of Fact 46*

2 There can be no genuine dispute that Finding of Fact 46 is ambiguous. Indeed, the
3 Ninth Circuit Court of Appeals has twice made that determination. *United States v. Lummi*
4 *Nation*, 763 F.3d 1180, 1187 (9th Cir. 2014); *Lummi Indian Tribe*, 235 F.3d at 449.
5 Accordingly, the Court moves to the next step in the analysis.
6

7 *2. Evidence Before Judge Boldt*

8 The next step is to determine whether Judge Boldt intended to include the disputed area
9 in the description of the Lummi's U&A in FF 46. The burden is on the S'Klallam to provide
10 evidence that will enable the Court to "interpret the decree in specific geographic terms."
11 *Muckleshoot Indian Tribe v. Lummi Indian Nation*, 141 F. 3d 1355, 1360 (9th Cir. 1998)
12 ("Muckleshoot I"). It is the evidence that was before Judge Boldt when he made his finding
13 that is relevant to the inquiry. *Id.* at 1359 ("The only relevant evidence is that which was
14 considered by Judge Boldt when he made his finding"); *Puyallup Indian Tribe v. Muckleshoot*
15 *Indian Tribe*, 235 F.3d 429, 434 (9th Cir.2000) ("Muckleshoot III") ("[The] most relevant
16 evidence in determining what Judge Boldt intended by the [ambiguous] phrase consists of the []
17 documents referenced in the finding").
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20 The S'Klallam argue that in looking at the evidence before Judge Boldt, there is both no
21 specific reference to any of the disputed area and no evidence supporting any additional U&A
22 than the areas described in FF 46. As a result, the S'Klallam urge the conclusion that Judge
23 Boldt did not intend the disputed waters to be included in the Lummi U&A. In its motion for
24 summary judgment, the Lummi advances several different arguments for its contention that the
25 case area waters are not part of the Strait of Juan de Fuca, which has been excluded from the
26 Lummi U&A. For the reasons below, the Court agrees with the S'Klallam and rejects Lummi's
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1 arguments – an examination of the record before Judge Boldt in 1974 reveals that there is no
2 factual evidence to establish that the Lummi customarily fished at any time in the disputed
3 waters at issue here. Thus, there is no factual basis to support any claim by the Lummi to U&A
4 rights in the disputed area. The absence of such specific evidence results in this Court’s
5 determination that Judge Boldt did not intend to include the disputed waters in the Lummi’s
6 U&A. *See Upper Skagit Indian Tribe v. Washington*, 590 F.3d 1020, 1025 (9th Cir. 2010).
7

8 Before even engaging in the two-step analysis, the Lummi argue that the waters west of
9 Whidbey Island are not linguistically excluded from the Northern Puget Sound, and that the
10 western waters of Whidbey Island fit geographically within the Sound as distinct from the
11 Strait of Juan de Fuca, and conclude that the disputed waters must therefore be part of the
12 Lummi U&A. Dkt. #167 at 8-11. However, that contention is not supported by case law or the
13 record, as further discussed herein.
14

15 In *Lummi Indian Tribe*, the Ninth Circuit found that, unlike for the Strait of Juan de
16 Fuca and Hood Canal, there were no linguistic clues in Decision No. 1 to compare for
17 Admiralty Inlet. *Lummi Indian Tribe*, 235 F.3d at 452. Accordingly, linguistic clues could not
18 be used to determine whether Admiralty Inlet was or was not intended to be included by Judge
19 Boldt. *Id.* (“[I]t is just as likely that this area was intended to be included as that it was not”).
20 In *Upper Skagit*, the Ninth Circuit held that “the inquiry properly focuses on individual U&As”
21 and the “fact that Judge Boldt defined ‘Puget Sound’ in one instance as including” specifically
22 named bodies of water “does not mean that references to ‘Puget Sound’ in other U&As always
23 include those same areas.” 590 F.3d 1026. “If anything,” the Ninth Circuit concluded, Judge
24 Boldt’s “inclusion of reference points in one U&A but not in another indicates a lack of intent
25 to include them generically.” *Id.* As this Court recently held, the fact that a geographic term
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1 may include the waters at issue does not mean on the basis of the evidence that Judge Boldt
2 intended to include them within a Tribe's U&A. *See* Subproceeding 14-01, Case No. C70-
3 9213, Dkt. No. 21017 at 6.

4 The Lummi then continue to contend that Dr. Lane's report supports its position. Dkt.
5 #167 at 13-19. Specifically, they assert that the disputed waters are necessarily included in
6 Judge Boldt's description of the U&A. The Lummi rely on Dr. Lanes testimony that Lummi
7 fishermen were "accustomed . . . to visit fisheries as distant as Fraser River in the north and
8 Puget Sound in the South," *USA-30 at 25*, and that "other fisheries in the Straits and bays from
9 the Fraser River south to the present environs of Seattle were utilized" by the Lummi. *USA-30*
10 at 26. *See* Dkt. #167 at 13-19. The Lummi has also relied on FF 13 in *Decision I* as support
11 for its argument. However, when FF 13 is read in its entirety, and together with the following
12 FF 14, they lead to the opposite conclusion from what the Lummi argue.

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15 These Findings of Fact, stated in full, read as follows:

16 13. Each of the Plaintiff tribes had usual and accustomed fishing places
17 within the case area. Although there are extensive records and oral history
18 from which many specific fishing locations can be pinpointed, it would be
19 impossible to compile a complete inventory of any tribe's usual and
20 accustomed grounds and stations. (FPTO § 3-34; Ex. USA-20, p. 21; Ex
21 USA-52, p. 4, l. 7 to p. 5, l. 29) Among the reasons for this are the
22 following: 1) Indian fisheries existed at all feasible places along a given
23 drainage system. Fishing stations which were the site of weirs or permanent
24 villages are more easily documented than riffles where fish were speared; 2)
25 Indian fishermen shifted to those locales which seemed most productive at
26 any given time depending upon such factors as changes in river flow,
27 turbidity or water course; 3) some important recorded fishing sites are no
28 longer extant because of subsequent man-made alterations in watersheds
and water systems; and, 4) use of some sites has been discontinued because
appropriate Indian gear for those sites has been outlawed or because
competing uses and users have made utilization of the sites by Indian
fishermen unfeasible. (Ex. USA-20, pp. 21-23; Ex. USA-27b, pp. 1-3)
Documentation as to which Indians used specific fishing sites is incomplete.
George Gibbs noted that:

1 ‘As regards the fisheries, they are held in common, and no tribe
2 pretends to claim from another, or from individuals, seignorage for
3 the right of taking. In fact, such a claim would be inconvenient to
4 all parties, as the Indians move about, on the sound particularly,
5 from one to another locality, according to the season.’ (Ex. USA-
6 20, p. 18; Ex. USA-27b, p. 3; Ex. G-4, p. 186)

7 14. Although not all tribes fished to a considerable extent in marine areas,
8 the Lummi reef net sites in Northern Puget Sound, the Makah halibut banks,
9 Hood Canal and Commencement Bay and other bays and estuaries are
10 examples of some Indian usual and accustomed fishing grounds and stations
11 in marine waters. Marine waters were also used as thoroughfares for travel
12 by Indians who trolled en route. (Ex. PL-75; Tr. 2847, l. 13 to 2850, l. 23)
13 Such occasional and incidental trolling was not considered to make the
14 marine waters traveled thereon the usual and accustomed fishing grounds of
15 the transiting Indians. (Tr. 2177, l. 24 to 2180, l. 4).

16 *U.S. v. Washington*, 384 F. Supp. at 353.

17 Thus, FF 13, with its references to drainage systems, riffles, weirs, river flow, turbidity,
18 and so on in Reasons 1 through 3, appears to address only fishing sites along rivers. It would
19 be pure speculation to infer that the “impossible to compile a complete inventory” statement
20 applies as well to fishing in the marine areas where none are mentioned; indeed logic and
21 linguistics lead to the opposite inference. Judge Boldt used terms specific to riverine areas in
22 FF 13 when he listed reasons why it was “impossible to compile a complete inventory” of any
23 tribe’s usual fishing areas. On the other hand, marine areas, and specifically the Lummi reef
24 net sites, are addressed in FF 14, which is also the basis for the oft-quoted principle that transit
25 through an area does not, without more specific evidence of fishing, lead to inclusion of an area
26 in a tribe’s U&A. Thus, FF 13 fails to support the conclusion that Judge Boldt intended to
27 include the case area in the Lummi U&A, and FF 14 leads to the conclusion that the Lummi
28 “natural pathway” argument must be rejected.

Nor does reference to Dr. Lane’s language regarding the Lummi’s “other fisheries in the
Straits and bays from the Fraser River south” (quoted from Exhibit USA-30, p. 26) aid the

1 Lummi position. First, the case area is not a bay, and according to the Lummi argument it is
2 not part of the Strait of Juan de Fuca either. Therefore they have not shown how the case area
3 could be included in the “other fisheries in the Straits and bays” referenced by Dr. Lane.
4 Second, this statement in her report is a summary conclusion, and must be read in context with
5 the entire report, particularly the sections that were cited or quoted by Judge Boldt in FF 45 and
6 46. Notably, Judge Boldt did not quote Dr. Lane’s “Straits and bays” conclusion in either
7 Finding of Fact. Instead, he cited extensively and repeatedly to Dr. Lane’s discussion of
8 reefnetting, its uniqueness and importance to the Lummi, their system of individual ownership
9 of reefnetting sites, and the location of those sites. *See* FF 45 and citations therein to Exhibit
10 USA-30 at 11 and 23.
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13 Dr. Lane went into great detail on reefnetting by the Lummi in her report, describing the
14 equipment and techniques, and the reasons for its success, which was attributed in part to
15 specialized knowledge of topography and salmon behavior and migration patterns. Exhibit
16 USA-30 at 12. “Usually the reefnet was located in a kelp-covered reef a short distance
17 offshore. Often it was opposite a headland that caused a backward sweep of tidal current. The
18 fish entered with the current.” Exhibit USA-30 at 17. “The more important reefnet locations of
19 the Semiahmoo-Lummi-Samish are noted in the section on usual and accustomed fishing sites
20 and are plotted on the accompanying map.” Exhibit USA-30 at 11. The map shows reefnet
21 sites at various points from Point Roberts south to the southern shore of Lopez Island. All
22 appear to be associated with promontories and headlands, and none are located south of Lopez
23 Island, where the case area begins. The singular importance of reefnetting to the Lummi was
24 acknowledged by Judge Boldt in FF 45, and the complete absence of any indicated sites from
25 the case area is significant.
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1 The section of Dr. Lane's report which was cited extensively, and sometimes quoted, by
2 Judge Boldt states, in its entirety:

3 USUAL AND ACCUSTOMED FISHING AREAS

4 While it is not possible to pinpoint every fishing site used by the ancestors
5 of the present Lummi Tribe of Indians prior to the Treaty of Point Elliot, **it**
6 **is feasible to indicate the general area of their fishing operations and**
7 **within the general area to designate certain sites as important or**
8 **principle fishing locations.**

9 The pre-treaty Lummi, along with the Semiahmoo and Samish, both of
10 whom were subsumed with the Lummi at the Treaty of Point Elliot, owned
11 reefnet locations in the San Juan Islands, off Point Roberts, off Lummi
12 Island, and Fidalgo Island.

13 The reefnetting grounds off Point Roberts were the largest in the entire area
14 and were situated within the aboriginal territory of the Semiahmoo. They
15 were used not only by the Semiahmoo but also by Saanich, Lummi, and
16 other Indians.

17 The grounds off Village Point, Lummi Island[,] were second in size to the
18 point Roberts grounds. At least two of the Lummi signers of the Point Elliot
19 Treaty owned reefnet locations off Village Point.

20 The main Samish location was off Iceberg Point, Lopez Island[,] in the San
21 Juans. Other Samish and Lummi locations were located off the southern
22 shores of Lopez. The Samish also fished with reefnets off Langley Point on
23 Fidalgo Island.

24 Other Lummi reefnet grounds were located off Shaw Island, Orcas Island,
25 Waldron Island, and off Cherry Point on the mainland.

26 The Birch Point grounds off Birch Bay lay within the aboriginal territory of
27 the Semiahmoo people.

28 In addition to using the reefnetting grounds noted above, the ancestors of
the present Lummi Tribe of Indians also trolled for salmon in the
contiguous salt waters of Haro and Rosario Straits and in the islands,
speared them in the bays and streams of the mainland, and took them by
means of weirs and traps in the rivers. There were, in addition, other
important fisheries, including halibut banks, but discussion here is limited
to salmon (including steelhead) fisheries.

1 **The traditional fishing areas discussed thus far extended from what is**
2 **now the Canadian border south to Anacortes.** This description included
3 the traditional fishing areas of the Semiahmoo and the Samish. Some of the
4 present Lummi Tribe are descendants of the pre-treaty Semiahmoo and
5 Samish groups. Other descendants of these pre-treaty entities have not
6 become members of the Lummi Tribe and those descendants would, of
7 course, legitimately make claim to some of the same usual and accustomed
8 fishing area included here.

9 **In addition to the home territory discussed to this point, Lummi**
10 **fishermen were accustomed, at least in historic times, and probably**
11 **earlier, to visit fisheries as distant as the Fraser River in the north and**
12 **Puget Sound in the south.**

13 In the same manner, Saanich, Clallam, Skagit and other Indians fished in
14 waters described above as within Semiahmoo, Lummi and Samish territory.
15 The Straits and Sound were traditional highways used in common by all
16 Indians of the region and most saltwater fisheries traditionally were free
17 access areas. This point is discussed at some length in the Summary
18 Anthropological Report,⁴ pages 15-19. While it is useful for certain
19 purposes to speak of Lummi waters, or Samish territory, it is important to
20 note that this by no means implies exclusive rights by one group. That
21 these Indians travelled [sic] widely and frequently throughout the waters of
22 the Sound and Straits is commented on by numerous early observers.

23 Exhibit USA-30 at 23-24 (emphasis added).

24 This Court previously found, and it continues to find, that several aspects of this section
25 have significant implications for the Lummi “logic and linguistics” argument. See Dkt. #59 at
26 14-15. First, Dr. Lane stated that it was feasible to indicate a general area for the fishing
27 operations of the Lummi, and within that general area to designate important sites, but not all of
28 them. This is contrary to the sense in which the Lummi would have the Court read the
“impossible to compile a complete inventory” language in FF 13. They use this language to
invite consideration of unnamed locations well outside the designated area, but this section
shows that was not Dr. Lane’s intent. (And as shown above, Judge Boldt’s “complete
inventory” remark appears to be addressed to river fishing sites, not marine areas.) Second, the
“traditional fishing areas” of the Lummi were designated as extending only as far south as

1 Anacortes, well above the case area. Judge Boldt cited specifically to this section of the report
2 and used the specific place names in FF 45, thus indicating his reliance upon this section.

3 Further, Dr. Lane named only two places, Fraser River in the north and Puget Sound to
4 the south, as fisheries visited by Lummi fisherman; she did not report that they fished all the
5 waters in between, or mention any intermediate fisheries. While Judge Boldt described the
6 Lummi U&A in FF 46 as including marine areas from Fraser River south to the present
7 environs of Seattle, “and particularly Bellingham Bay,” the Lummi have pointed to no facts
8 before Judge Boldt which would support the conclusion that he intended to include **all** the
9 marine waters in between. Indeed, this Court has found in a previous subproceeding that
10 Judge Boldt’s “from” and “to” language in describing a U&A does not include all the waters in
11 between. In a recent subproceeding addressing similar language by Judge Boldt in describing
12 the Suquamish U&A (“the marine waters of Puget Sound **from** the northern tip of Vashon
13 Island **to** the Fraser River including Haro and Rosario Straits, the streams draining into the
14 western side of this portion of Puget Sound and also Hood Canal”), this Court found that Judge
15 Boldt did not intend to include all of Puget Sound, and excluded certain area to the east of
16 Whidbey Island. Subproceeding 05-03, *affirmed*, *U.S. v. Washington (Upper Skagit v.*
17 *Suquamish)*, 590 F. 3d 1020 (9th Cir. 2010). This determination was made by examining the
18 evidence that was before Judge Boldt, specifically Dr. Lane’s report on Suquamish fishing
19 areas. Here, the pointed reference to Bellingham Bay, far to the north of the case area, is
20 significant. Likewise, the description of the Straits and Sound as “highways” used by all tribes
21 reinforces the rule set forth by Judge Boldt in FF 14 that incidental trolling during travel does
22 not “make the marine waters traveled thereon the usual and accustomed fishing grounds of the
23 transiting Indians.” *U.S. v. Washington*, 384 F. Supp. at 353.
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1 The Lummi also point to a map that was before Judge Boldt, namely Exhibit USA-62,
2 which is a reproduction of a U.S. coastal survey map from 1853. Dkt. #167 at 15-16. The
3 Lummi assert that the placement of the lettering for “Strait of Juan de Fuca” on this map would
4 have led Judge Boldt to conclude that the eastern extent of the Strait was approximately
5 Angeles Point. Dkts. #167 at 15 and #43 at 18.² This Court had previously found that the
6 Lummi’s argument is unavailing for many reasons, not the least of which is that it is purely
7 speculative with respect to Judge Boldt’s meaning or intent. Dkt. #59. While Judge Boldt did
8 cite to USA-62 in FF 45, it was specifically in regard to the locations of Orcas Island, San Juan
9 Island, Lummi Island, Fidalgo Island, Point Roberts, and Sandy Point. *U.S. v. Washington*, 384
10 F. Supp. at 360. Thus this map, while historically interesting, is of no import in the context of
11 this subproceeding.
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14 The Lummi argue that its U&A includes the case area because the Ninth Circuit
15 expressly held that the Lummi’s U&A includes Admiralty Inlet, which the Ninth Circuit
16 defined as “consist[ing] of the waters to the west of Whidbey Island, separating that island from
17 the Olympic Peninsula.” Dkts. #167 at 8 and 17 and #43 at 6 (quoting *Lummi*, 235 F.3d at
18 452). This argument misreads the Ninth Circuit’s definition of Admiralty Inlet and
19 impermissibly expands its scope. The correct reading of the Ninth Circuit language describes
20 Admiralty Inlet as “(those) waters to the west of Whidbey Island (which) separate that island
21 from the Olympic Peninsula;” in other words, only the southern portion of the waters west of
22 Whidbey Island. The fact that the Lummi understood the “waters west of Whidbey Island” to
23 be distinct from Admiralty Inlet is evidenced from their own Cross-Request for Determination,
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27 ² Because the Lummi has stated that it continues to rely on numerous prior pleadings in this
28 case in support of its instant motion for summary judgment, *see* Dkt. #167 at 3-4, the Court
cites to those prior filings where applicable in its discussion.

1 filed in Subproceeding 89-2, which names them separately and disjunctively. *See* C70-9213 at
 2 Dkt. #11690.

3 Based on the analysis of Dr. Lane's report and FF 45 and 46, the Court finds that
 4 neither logic nor linguistics would compel the conclusion that the waters to the west of northern
 5 Whidbey Island were intended by Judge Boldt to be included in the Lummi U&A.
 6 Accordingly, the Court need not reach any determination under Paragraph (a)(6) in this matter.
 7

8 **V. CONCLUSION**

9 Having reviewed the parties' motions for summary judgment, the responses thereto and
 10 replies in support thereof, along with all supporting declarations and exhibits and the remainder
 11 of the record, the Court hereby FINDS and ORDERS:
 12

- 13 1. S'Klallam's Motion to Strike (Dkt. #183 at 16-19) is DENIED AS MOOT.
- 14 2. S'Klallam's Motions to Strike Certain Declarations and Exhibits (Dkts. #186 at 2-4,
 15 #193 at 9-11, #199 and #205) are GRANTED.
- 16 3. Suquamish Indian Tribe's and Lummi Nations's Motions to Strike Reply Briefs
 17 (Dkts. #200 and #202)³ are DENIED.
- 18 4. Lummi Nations's Motion for Summary Judgment (Dkt. #167)⁴ is DENIED for the
 19 reasons set forth above.
- 20 5. S'Klallam's Motions for Summary Judgment (Dkts. #164 and #168)⁵ are
 21 GRANTED:
 22

- 23 a. The Regulations issued by the Lummi Nation are actions in violation of
 24
 25 Final Decision I.

26 ³ Dkts. #21,056 and #21,058 in *USA v. Washington*, C70-9213RSM.

27 ⁴ Dkt. #20,976 in *USA v. Washington*, C70-9213RSM.

28 ⁵ Dkts. #20,972 and #20,977 in *USA v. Washington*, C70-9213RSM.

- 1 b. The Lummi's U&A is specifically determined, and it does not contain the
2 waters in dispute in this subproceeding. The Lummi's U&A does not
3 include the eastern portion of the Strait of Juan de Fuca or the waters west of
4 Whidbey Island, an area more specifically described as – the marine waters
5 east of a line running from Trial Island near Victoria, British Columbia, to
6 Point Wilson on the westerly opening of Admiralty Inlet, bounded on the
7 east by Admiralty Inlet and Whidbey Island, and bounded on the north by
8 Rosario Strait, the San Juan Islands, and Haro Strait.
- 9
- 10 c. The Lummi Nation is permanently enjoined from issuing regulations or
11 otherwise authorizing its fishers to exercise treaty fishing rights in the
12 eastern portion of the Strait of Juan de Fuca or the waters west of Whidbey
13 Island, as described above, and permanently prohibited from exercising or
14 purporting to authorize treaty fishing in these waters.
- 15
- 16 d. Any and all future Lummi fishing regulations that open for fishing any
17 waters adjacent to the waters in the eastern portion of the Strait of Juan de
18 Fuca or the waters west of Whidbey Island, as described above, shall
19 expressly and unambiguously acknowledge that the Lummi Nation has no
20 authority to open, and that its fishers are not entitled to engage in, treaty
21 fishing in the waters in the eastern portion of the Strait of Juan de Fuca or
22 the waters west of Whidbey Island, as described above.
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DATED this 17th day of July 2015.

A handwritten signature in black ink, appearing to read 'R. Martinez', is written over a horizontal line.

RICARDO S. MARTINEZ
UNITED STATES DISTRICT JUDGE